No. 08-779

In the Supreme Court of the United States

DAVID C. WITTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals should have engaged in closer review of petitioner's above-Guidelines sentence to determine whether it was reasonable.

2. Whether petitioner's sentence was unreasonable because the district court relied in part on the need to avoid unwarranted disparity with the sentence imposed on petitioner's co-defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 528 F.3d 1280. A prior opinion of the court of appeals (Pet. App. 87a-137a) is reported at 437 F.3d 1023. Another prior opinion of the court of appeals (Pet. App. 71a-86a) is not published in the Federal Reporter but is reprinted in 206 Fed. Appx. 763. The opinion of the district court regarding petitioner's sentence (Pet. App. 19a-70a) is reported at 474 F. Supp. 2d 1215.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2008. A petition for rehearing was denied on September 16, 2008 (Pet. App. 138a-139a). The petition for a writ of certiorari was filed on December 15, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of conspiring to submit false entries to a federally insured bank and to commit money laundering, in violation of 18 U.S.C. 371; four counts of making false entries in bank records, in violation of 18 U.S.C. 1005; and one count of money laundering, in violation of 18 U.S.C. 1957. He was sentenced to 51 months of imprisonment. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. Pet. App. 87a-137a. On remand, the district court sentenced petitioner to a prison term of 60 months. The court of appeals again vacated the sentence and remanded for resentencing. *Id.* at 71a-86a. On remand, the district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2a. The court of appeals affirmed the sentence of imprisonment, but reversed one condition of supervised release. *Id.* at 1a-18a.

1. Petitioner was the chairman of the board, president, and chief executive officer of the largest electric utility in Kansas. In 2001, he had a $3.5 million line of credit at Capital City Bank in Topeka. Petitioner agreed to loan bank president Clinton Weidner $1.5 million to invest in an Arizona real estate venture. Petitioner signed an agreement stating that his line of credit would be increased to $5 million, but he crossed out that figure and replaced it with $6 million. Petitioner then faxed the signed agreement to the bank. Later that day, $1.5 million was deposited in petitioner's account and then transferred to the company managing the Arizona

real estate transaction. Petitioner obtained two additional $500,000 increases in his line of credit within the next few months, and he also received $97,000 in profit on the loan, based on the difference between the interest he paid to the bank and the interest he charged Weidner. Petitioner and Weidner concealed the loan from the bank by filing false documents. In January 2002, petitioner submitted an annual financial statement, as required by the terms of his credit agreement with the bank, but he failed to disclose the loan to Weidner in the statement of his assets and liabilities. Pet. App. 2a-3a & n.1, 72a-74a, 89a-94a, 103a-108a, 113a; Gov't C.A. Br. 2-5.

2. A federal grand jury in the District of Kansas returned an indictment charging petitioner with one count of conspiracy, in violation of 18 U.S.C. 371; four counts of making false bank entries, in violation of 18 U.S.C. 1005; and one count of money laundering, in violation of 18 U.S.C. 1957. After a jury trial, petitioner was found guilty on all six counts. Pet. App. 74a.

In February 2004, the district court sentenced petitioner pursuant to the then-mandatory Sentencing Guidelines. The court determined that petitioner's Guidelines sentencing range was 51-63 months and sentenced him to 51 months of imprisonment. Pet. App. 3a.

The court of appeals affirmed petitioner's convictions, but vacated his sentence and remanded for resentencing. Pet. App. 87a-137a. The court held that the district court erred in applying a 16-level Guidelines enhancement based on a finding that the intended loss was more than $1 million, see Sentencing Guidelines § 2B1.1(b)(1)(I), and an additional two-level enhancement based on a finding that petitioner derived more than $1 million in gross receipts from a financial institu-

tion, see *id.* § 2B1.1(b)(12)(A) (2001). Pet. App. 127a-134a. The court of appeals remanded for the district court to recalculate petitioner's Guidelines range and to resentence him treating the Guidelines as advisory under *United States* v. *Booker*, 543 U.S. 220 (2005), which had been decided while his appeal was pending. Pet. App. 89a, 137a.

3. On remand, the district court again used the intended loss and gross receipts enhancements to calculate petitioner's Guidelines range. Pet. App. 4a. After considering the factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 60 months of imprisonment, indicating that the sentence would be appropriate even if the intended loss and gross receipts enhancements did not apply. Pet. App. 5a.

The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 71a-86a. The court again held that the district court had erred in increasing petitioner's base offense level of six, explaining that petitioner's "Guidelines sentencing range was 0 to 6 months, well below his actual sentence of 60 months." *Id.* at 81a-83a. The court of appeals rejected the government's argument that any error in the Guidelines calculation was harmless, concluding that the district court had provided an insufficient explanation for the "dramatic variance" from the Guidelines range. *Id.* at 83a-85a.

4. On remand, the district court recognized that the court of appeals had "ruled that the applicable guideline range in this case is zero to six months." 2/5/07 Sent. Tr. 52; see Pet. App. 40a. After considering the factors in 18 U.S.C. 3553(a), the court sentenced petitioner to 24 months of imprisonment. 2/5/07 Sent. Tr. 61, 105. The court identified several circumstances that justified the

variance, including that petitioner "intended to profit" from a fraudulent scheme involving a financial institution and that he in fact benefitted from the scheme by increasing his line of credit at the bank and collecting interest from Weidner. *Id.* at 65-66; Pet. App. 59a-61a.

The court also considered the need to avoid "unwarranted sentence disparities among the defendants with similar records who have been found guilty of similar conduct." 2/5/07 Sent. Tr. 68; Pet. App. 61a (quoting 18 U.S.C. 3553(a)(6)). The court noted that the Guidelines sentencing range for a defendant convicted of a fraudulent scheme involving $1.5 million would ordinarily be at least 41 to 51 months. 2/5/07 Sent. Tr. 69; Pet. App. 61a. In addition, the court found "substantial similarities" between petitioner's conduct and that of his co-defendant Weidner, who received a 60-month sentence, including that both men "purposely made a profit" from the fraudulent loan transaction and then filed documents with the bank that failed to disclose the loan. 2/5/07 Sent. Tr. 69-72; Pet. App. 61a-63a. The court also recognized "dissimilarities," including that Weidner was a bank fiduciary and testified falsely at sentencing hearing. *Id.* at 63a.

Finally, the court gave "significant weight" to the need for the sentence to provide general and specific deterrence. Pet. App. 64a-65a. The court found that petitioner's failure to acknowledge any responsibility for his conduct and his violation of a court order by transferring financial assets while on release pending appeal demonstrated that he would not be deterred by a sentence within the Guidelines range. The court also concluded that a within-Guidelines sentence would not deter "other bank customers who might be inclined to engage

in such criminal conduct." 2/5/07 Sent. Tr. 73-75; Pet. App. 64a-65a.

5. The court of appeals affirmed the district court's imposition of a 24-month prison term, holding that the sentence was both procedurally and substantively reasonable.[1] Pet. App. 1a-18a. The court rejected petitioner's claim that the district court erred in considering the need to avoid unwarranted disparity between petitioner's sentence and that of his co-defendant. *Id.* at 10a ("'co-defendant disparity is not a per se 'improper' factor' post-*Gall* [v. *United States*, 128 S. Ct. 586 (2007)]") (quoting *United States* v. *Smart*, 518 F.3d 800, 804 (10th Cir. 2008)). Under the deferential standard of review adopted by this Court in *Gall*, the court found "no abuse of discretion" in the district court's sentencing decision. Pet. App. 10a-11a.

Judge Hartz concurred in a separate opinion that was joined by the other two members of the panel. Pet. App. 17a-18a. Judge Hartz disagreed with the Tenth Circuit's "recent jurisprudence regarding substantive reasonableness of sentences." *Id.* at 17a. In his view, a "significant variance" from the Guidelines range "should be considered unreasonable if it can be justified only by disagreement with the general views of other judges." *Id.* at 18a.

ARGUMENT

1. Petitioner contends (Pet. 1-3, 11-21) that this Court should grant review to resolve "confusion amongst the courts of appeals regarding the permissible

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[1] The court of appeals reversed a supervised release condition that prohibited petitioner from being employed as an executive or engaging in financial agreements or negotiations in a professional capacity without first obtaining court approval. Pet. App. 11a-16a.

scope of reasonableness review when an anomalous sentence is imposed in a mine-run case based on the district court's idiosyncratic views." The decision below is correct; it does not conflict with any decision of any other court of appeals; and this case is not a suitable vehicle to resolve the question presented because the sentencing court did not rely on its "idiosyncratic views" to impose a variant sentence in a "mine-run case." This Court's review is therefore unwarranted.

In *Gall* v. *United States*, 128 S. Ct. 586 (2007), the Court held that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Id.* at 591. In reviewing a non-Guidelines sentence, the appellate court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 597. As petitioner notes (Pet. 1-2, 13), this Court has left open whether "closer review may be in order" on appeal "when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine- run case." *Kimbrough* v. *United States*, 128 S. Ct. 558, 575 (2007) (quoting *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007)). That issue is not presented here, however, because the district court did not base its variance "solely" on a conclusion that the Guidelines sentencing range failed to satisfy the Section 3553(a) factors in a "mine-run case." Instead, the court identified particular facts and circumstances that placed petitioner's case outside the mine run of bank fraud cases for which the Guidelines recommended a sentence of 0 to 6 months of imprisonment. See Pet. App. 8a (district court "con-

cluded the guidelines did not adequately account for the specific circumstances of the case"); *id.* at 56a-57a (court "focuse[d] on facts particular to" petitioner); *id.* at 66a (factors court relied on were "not commonplace, but instead particular to" petitioner); 2/5/07 Sent. Tr. 68 (emphasizing importance of avoiding unwarranted disparity, "given the individual and particularized circumstances of this case"); *id.* at 73-74 (need for sentence to afford deterrence was "significant" in light of "individual factors and particularized circumstances of this case"). The court identified a number of factors that distinguished petitioner from other defendants who were subject to a minimal sentence under the Guidelines, including his participation in a $1.5 million bank fraud, his failure to acknowledge responsibility for the crime, and his transfer of assets in violation of a court order. 2/5/07 Sent. Tr. 65-66, 70-71, 74; Pet. App. 59a-60a, 65a.

In short, the district court based the variance on "uncommon * * * facts" for which petitioner's Guidelines range did not "adequately account." 2/5/07 Sent. Tr. 62-63, 76; Pet. App. 57a, 66a. As this Court explained in *Kimbrough*, "a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'" 128 S. Ct. at 574-575 (quoting *Rita*, 127 S. Ct. at 2465); see *Gall*, 128 S. Ct. at 597-598 ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.") (quoting *Rita*, 127 S. Ct. at 2469). The court of appeals correctly gave "due deference" to the district court's determination that the Section

3553(a) factors justified petitioner's 24-month sentence. Pet. App. 10a-11a (quoting *Smart*, 518 F.3d at 808).

Petitioner seizes on the district court's statement that an upward variance was "necessary to afford adequate deterrence to bank customers who are aiders and abettors to nominee loans with bank officers," Pet. App. 64a-65a, claiming (Pet. 15) that the court improperly relied on its own "personal view" in issuing a "categorical rule" that was "not tied to the particular facts of *this* case or *this* defendant." As explained above, however, the district court based its decision to vary primarily on circumstances that were specific to petitioner's case. But even if petitioner's account of the district court's sentencing rationale were accurate, this Court has made clear that sentencing courts "may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 128 S. Ct. at 570 (brackets in original) (quoting U.S. Br. at 16); see *Spears* v. *United States*, 129 S. Ct. 840, 843-844 (2009) (per curiam) ("district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines"); *Rita*, 127 S. Ct. at 2465 (district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations").

Contrary to petitioner's contention (Pet. 1-2, 11-21), there is no disagreement among the courts of appeals about whether sentencing courts are required to base variances from the Guidelines range "on factors unique to the defendant or offense rather than on personal disagreement with Guidelines policies." Pet. 11. In *United States* v. *Ofray-Campos*, 534 F.3d 1, cert. denied, 129 S. Ct. 588 (2008), and 129 S. Ct. 999 (2009), the First Circuit held that case-specific factors cited by the district

court—the defendant's possession of "powerful weapons" as a "triggerman" and his involvement with violence in connection with drug activity—did not justify a sentence at the statutory maximum. *Id.* at 42-44. The court said nothing about the permissibility of a variance based on a disagreement with Guidelines policy. *Ibid.* The other First Circuit decision petitioner cites, *United States* v. *Martin*, 520 F.3d 87, 96 (2008), affirmed a below-Guidelines sentence, noting that *Kimbrough* "opened the door for a sentencing court to deviate from the guidelines in an individual case even though that deviation seemingly contravenes a broad policy pronouncement of the Sentencing Commission." Subsequent decisions of the First Circuit have reaffirmed that "district judges may deviate from the guidelines even on the basis of categorical policy disagreements with its now-advisory provisions." *United States* v. *Boardman*, 528 F.3d 86, 87 (2008); see *United States* v. *Vanvliet*, 542 F.3d 259, 271 (2008) (same). In *United States* v. *Levinson*, 543 F.3d 190, 199-202 (2008), the Third Circuit vacated and remanded a below-Guidelines sentence, holding that the district court had relied on a clearly erroneous factual finding and provided an inadequate explanation for the variance. The Third Circuit also suggested that a sentencing court, rather than "stat[ing] its own general sentencing policies in contravention of the Guidelines," "must explain why the general policy should not apply in the particular case before it," *id.* at 199-201 & n.8 (citing *United States* v. *Gunter*, 527 F.3d 282, 286 (3d Cir. 2008), petition for cert. pending, No. 08-8109 (Dec. 23, 2008)), but this Court rejected that view in *Spears*. 129 S. Ct. at 845 (error in *Gunter* is "evident"). Finally, petitioner places "particular" reliance (Pet. 19-20) on the Sixth Circuit's decision in *United*

States v. *Funk*, 534 F.3d 522, reh'g en banc granted and opinion vacated (6th Cir. Dec. 18, 2008) (No. 05-3708), but that decision has been vacated on the granting of rehearing en banc.[2]

2. Petitioner also contends (Pet. 3-4, 21-27) that 18 U.S.C. 3553(a)(6), which directs sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," does not authorize consideration of potential disparity between sentences imposed on co-defendants. Contrary to petitioner's claim (Pet. 27), this Court made clear in *Gall* that Section 3553(a)(6) does not merely "direct[] district courts to avoid unwarranted nationwide disparities," but also permits consideration of disparity among co-defendants' sentences. In affirming the below-Guidelines sentence in *Gall*, the Court rejected the government's argument that the district court "failing to consider whether a sentence of probation would create unwarranted disparities, as required by § 3553(a)(6)." 128 S. Ct. at 598. Citing the district court's discussion with the prosecutor about the sentences imposed on two of Gall's co-defendants and the co-defendants' participation in the conspiracy, the Court found that "the judge gave specific attention to the issue of disparity when he inquired about the sentences already imposed by a different judge on two of Gall's codefendants," *id.* at 599, and took

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[2] Nor is substantive reasonableness review an "empty gesture" in the Tenth Circuit, as petitioner contends. Pet. 13 (quoting Pet. App. 17a). See *United States* v. *Friedman*, 554 F.3d 1301, 1308 (2009) ("even given the highly deferential abuse-of-discretion standard of review," 57-month sentence for defendant who had "an extraordinary record as a recidivist bank robber and general criminal" was substantively unreasonable).

into account both the "need to avoid unwarranted disparities" and "the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated." *Id.* at 600. The district court in this case properly compared the circumstances of petitioner's case with those of his co-defendant's case in imposing a sentence that accounted for both the "substantial similarities" and "dissimilarities" in their records and criminal conduct. 2/5/07 Sent. Tr. 69-73; Pet. App. 61a-64a.

Petitioner cites (Pet. 3, 22) pre-*Gall* decisions noting that courts of appeals had taken different positions on whether Section 3553(a)(6) authorized consideration of sentencing disparities among co-defendants, see *United States* v. *Wills*, 476 F.3d 103, 109 n.5 (2d Cir. 2007), but whatever disagreement previously existed was resolved by *Gall*. As petitioner notes (Pet. 4, 23), the Seventh Circuit has stated that it "will only disturb a sentence based on an unjustifiable disparity between co-defendants . . . if it actually creates a disparity between the length of the appellant defendant's sentence and all other similar sentences imposed *nationwide*." *United States* v. *Omole*, 523 F.3d 691, 700 (2008) (internal quotation marks omitted). But the *Omole* court made that statement in rejecting a defendant's claim that his within-Guidelines sentence was unreasonable, and the court did not suggest that it would be error for a district court to consider disparity among co-defendants' sentences. *Ibid.*; see *United States* v. *Smith*, 510 F.3d 603, 609-610 (6th Cir. 2007) (affirming within-Guidelines sentence and rejecting claim that sentencing court's discretion was limited by "the most lenient sentence that another court had imposed for a similar crime"), cert. denied, 128 S. Ct. 1910 (2008). The only other post-*Gall* decision petitioner cites as contrary to the decision be-

low is non-precedential. See *United States* v. *Vidal*, 275 Fed. Appx. 873, 878 (11th Cir. 2008). The court there concluded that the defendant's above-Guidelines sentence was reasonable, explaining that "[t]he fact that some of Vidal's codefendants received shorter sentences than he did does not mandate a different result." As the Sixth Circuit has explained, while a district judge is not required to consider disparity between co-defendants' sentences, the judge "*may* exercise his or her discretion and determine a defendant's sentence in light of a co-defendant's sentence." *United States* v. *Presley*, 547 F.3d 625, 632 (2008) (quoting *United States* v. *Simmons*, 501 F.3d 620, 623 (6th Cir. 2007)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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